

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-01322-EWN-KLM

STEPHEN WALTER PHILLIPS,

Plaintiff,

v.

THE PEPSI BOTTLING GROUP,

Defendant.

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**PLAINTIFF'S MOTION FOR RECUSAL OF JUDGE NOTTINGHAM  
PURSUANT TO 28 U.S.C. §144 and §455(a) and (b)(1)**

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The Plaintiff, Stephen Walter Phillips, by and through his attorney, James A. Carleo, pursuant to 28 U.S.C. §144 and §455(a) and (b)(1), asks that Judge Nottingham disqualify himself, and as grounds states the following:

**CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCIVR 7.1A**

1. Counsel for Plaintiff contacted Defendant's counsel, Ms. Vickles, on October 31, 2007 regarding this matter. Ms. Vickles responded the same day, advising that she would not agree to Plaintiff's motion.

**STATUTORY AUTHORITY**

2. Plaintiff asks that Judge Nottingham disqualify himself pursuant to 28 U.S.C. §144 and §455(b)(1), due to personal bias against Plaintiff.

3. Plaintiff asks that Judge Nottingham disqualify himself pursuant to 28 U.S.C. §455(a), because his impartiality could reasonably be questioned.

**FACTUAL BASIS**

4. On September 20, 2007, Plaintiff and his counsel, James A. Carleo, participated in a court ordered settlement conference with Magistrate Judge Kristen L. Mix. (Phillips Affidavit, hereafter Phillips Aff. ¶2; Carleo Affidavit, hereafter Carleo Aff. ¶6)

5. During discussions with Plaintiff and Carleo, Magistrate Judge Mix made the following statement to Plaintiff: “*The biggest problem with your case is that Judge Nottingham hates employment cases and there’s nothing you can do about it, it’s random. Now don’t get me wrong, he’s a fine judge, but he just hates employment cases. That’s why he will try to find any way in the summary judgment briefs to say there’s no material issues and grant summary judgment, and if he doesn’t, he will make it tough at trial, and you won’t win.*” (Phillips Aff. ¶9; Carleo Aff. ¶14)

6. Near the end of the settlement conference Magistrate Judge Mix revealed Judge Nottingham’s unfavorable predisposition saying, “*Mr. Phillips, I’m going to look you right in the eye and tell you that you’re gonna lose.*” (Phillips Aff. ¶15; Carleo Aff. ¶23)

7. Previously, on February 13, 2007, Judge Nottingham entered an Order granting Plaintiff’s Fed.R.Civ.P. 56(f) motion for a continuance of Summary Judgment Proceedings to Permit Discovery to be Reopened because of Defendant’s late production of two documents, including a May 10, 1999 letter of termination. [Docket #48, pp. 1, 7]

8. Judge Nottingham found Plaintiff’s motion timely; the documents relevant; and, that Defendant withheld the documents from Plaintiff until after summary judgment briefing. Despite attributing no fault to Plaintiff, Judge Nottingham “*reluctantly*” granted Plaintiff’s

motion to continue summary judgment proceedings and reopen discovery. [Docket #48, pp. 5, 7; Docket #50, p. 2]

9. Having fully sided with Plaintiff on this issue, Judge Nottingham, nonetheless, benefited the Defendant by giving Plaintiff illusory additional discovery rights. (Carleo Aff. ¶¶24-30)

10. Judge Nottingham limited discovery to the re-deposing of Scott Beijer who previously testified, in an affidavit, that he had no recollection of the circumstances surrounding the May 10, 1999 termination letter. [Docket #48, pp. 3, 7]

11. Judge Nottingham denied Plaintiff any discovery beyond the Beijer deposition, noting that although he had granted Plaintiff's motion "...*the equities tipped – barely – in Plaintiff's favor.*" Slamming the door on any meaningful discovery, Judge Nottingham said, "*Plaintiff is entitled to nothing more.*" In other words there is no there – there. [Docket #50]

12. Judge Nottingham's ruling allowing suspension of summary judgment proceedings and additional discovery was a façade, designed to facilitate the appearance of due process and fairness. [Docket #48]

13. Judge Nottingham makes no mention of the burden placed on Plaintiff in having to resubmit a summary judgment response. There is no comment or accommodation for Plaintiff's incurring of costs related to the Beijer deposition, including Mr. Carleo's trip to Salt Lake City, Utah. [Docket #48; Docket #50]

14. In contrast, Judge Nottingham's February 2007 Orders stringently avoid any sharp-tongued rebuke of Defendant and its attorneys for their withholding of documents. [Docket #48; Docket #50]

15. Judge Nottingham's unfavorable predisposition, bias and prejudice against Plaintiff is so extreme as to display clear inability to render fair judgment. (Phillips Aff. ¶16; Carleo Aff. ¶31)

16. Judge Nottingham's loathing of employment cases, has manifested itself into a predisposition to dismiss Plaintiff's case and requires disqualification. Moreover, Magistrate Judge Mix's pejorative reference to "*employment cases*" rather than "*Civil Rights Cases*", demonstrates both her and Judge Nottingham's dismissive attitude. (Phillips Aff. ¶¶9, 15; Carleo Aff. ¶¶14-23)

17. Magistrate Judge Mix's unequivocal guarantee that Mr. Phillips is going to lose has deprived Mr. Phillips of his right to due process. (Phillips Aff. ¶15; Carleo Aff. ¶23)

18. Magistrate Judge Mix's guaranteeing that Plaintiff will lose smacks of: the fix is in; it's a done deal; and, the decision has been made. (Phillips Aff. ¶15; Carleo Aff. ¶23)

19. These multiple instances of troubling judicial conduct would cause a reasonable person to harbor doubts about the Judge's impartiality.

#### **LEGAL AUTHORITY**

20. "*The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.*" United States v. Nickl, 427 F.3d 1286 (10<sup>th</sup> Cir. 2005) citing Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)

21. The test in this Circuit is "*whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.*" United States v. Cooley, 1 F.3d 985, 991 (10<sup>th</sup> Cir. 1993)

22. Under §455(a), “[W]hat matters is not the reality of bias or prejudice but its appearance.” Liteky v. United States, 114 S. Ct. 1147, 1154 (1994)

23. A judge’s recusal is mandated by 28 U.S.C. §455(a), which states that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Nichols v. Alley, 71 F.3d 347, 348 (10<sup>th</sup> Cir. 1995)

24. Accepting Plaintiff’s 28 U.S.C. §144 affidavit statements as true, as the Court must do, requires that Judge Nottingham disqualify himself in this action. United States v. Gigax, 605 F.2d 507, 511 (10<sup>th</sup> Cir. 1979)

25. Judge Nottingham’s hatred of “*employment cases*” and refusal to allow Plaintiff to prevail is tantamount to a refusal to enforce the Federal Civil Rights Laws.

**WHEREFORE**, Plaintiff respectfully asks that Judge Nottingham recuse himself from any further acts in this case.

Respectfully submitted this 1<sup>st</sup> day of November 2007.

s/James A. Carleo  
James A. Carleo, #5701  
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*Attorney for Plaintiff*

**CERTIFICATE OF SERVICE (CM/ECF)**

I certify that on November 1, 2007, I electronically filed the foregoing **PLAINTIFF'S MOTION FOR RECUSAL OF JUDGE NOTTINGHAM PURSUANT TO 28 U.S.C. §144 and §455(a) and (b)(1)**, with attachments, **STEPHEN WALTER PHILLIPS 28 U.S.C. §144 AFFIDAVIT, 28 U.S.C. §144 CERTIFICATION OF COUNSEL, AFFIDAVIT OF JAMES A. CARLEO** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

**Via Email:** [hvickles@sah.com](mailto:hvickles@sah.com)

Heather Fox Vickles, Esq.

s/Patsy A. Griffin

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**STEPHEN WALTER PHILLIPS 28 U.S.C. §144 AFFIDAVIT**

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I, Stephen Walter Phillips, hereby state under oath as follows:

1. I am over the age of 18 years, competent to testify, and have personal knowledge of the facts stated herein.
2. On September 20, 2007, I attended a Court Ordered settlement conference, in this case, which began at approximately 10:35 a.m.
3. The settlement conference began when Magistrate Judge Kristen L. Mix came into the courtroom and introduced herself to me. She shook hands with me and the others in the courtroom.
4. Magistrate Judge Mix led me and my attorney, Mr. Carleo, to a jury room. She left for a short time and returned to meet with my lawyer and I.
5. Magistrate Judge Mix began explaining the purposes of the settlement conference and the benefits of settlement and the risks of litigation.

6. Magistrate Judge Mix told me that “*now*” was the time to resolve the case and such an opportunity might not be there again.

7. Up to this point, Magistrate Judge Mix was very nice.

8. I told Magistrate Judge Mix that I understood what she was saying.

9. Magistrate Judge Mix then said to me, “*The biggest problem with your case is that Judge Nottingham hates employment cases and there’s nothing you can do about, it’s random. Now don’t get me wrong, he’s a fine judge, but he just hates employment cases. That’s why he will try to find anything in the summary judgment briefs to say there’s no material issues and grant summary judgment, and if he doesn’t, he will make it tough at trial, and you won’t win.*”

10. Magistrate Judge Mix told me that I should take whatever I could get from Pepsi.

11. Magistrate Judge Mix told me I should take the severance that they had offered me.

12. When I told Magistrate Judge Mix that I felt I had a good case and I wouldn’t settle for the severance benefits, she became very confrontive and demeaning towards my attorney and me.

13. Magistrate Judge Mix accused my attorney of exaggerating things in our settlement statement.

14. Magistrate Judge Mix said my attorney was not giving me good advice.

15. Finally, Magistrate Judge Mix told me, “*Mr. Phillips, I’m going to look you right in the eye and tell you that you’re gonna lose.*”

16. I believe as a result of Magistrate Judge Mix's statements that Judge Nottingham had a personal bias or prejudice against me and that I have no chance of prevailing in this litigation.



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**28 U.S.C. §144 CERTIFICATION OF COUNSEL**

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I, James A. Carleo, counsel of record for Plaintiff Stephen Walter Phillips, certify that the 28 U.S.C. § 144 affidavit of Stephen Walter Phillips is made in good faith.

Respectfully submitted this 1<sup>st</sup> day of November 2007.

s/James A. Carleo  
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*Attorney for Plaintiff*

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**AFFIDAVIT OF JAMES A. CARLEO**

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I, James A. Carleo, hereby state under oath as follows:

1. I am over the age of 18 years, competent to testify, and have personal knowledge of the facts stated herein.
2. In 1974, I was admitted in Colorado to State and Federal Courts. I was admitted to the United States Supreme Court in 1987.
3. I have handled Federal Civil Rights employment cases in the Federal Courts for the District of Colorado since 1984.
4. I have attended and participated in settlement conferences with U.S. Magistrate Judges on many occasions.
5. I am currently the attorney for the Plaintiff in this action, Stephen Phillips (Mr. Phillips).

6. On September 20, 2007, at 10:30 a.m., Mr. Phillips and I appeared at the Alfred A. Arraj United States Courthouse, 901 19<sup>th</sup> Street, Courtroom A501, Denver, Colorado, for a court-ordered settlement conference with Magistrate Judge Kristen L. Mix.

7. Mr. Phillips and I, as well as Defendant's counsel, Heather Vickles, were told to be seated in the courtroom. Defendant's representative was not present at the time.

8. At approximately 10:35 a.m., Magistrate Judge Mix came into the courtroom and walked over to Mr. Phillips and me to introduce herself. Magistrate Judge Mix was very cordial. She introduced herself as Kris and shook hands with Mr. Phillips and me. She then did the same with Ms. Vickles.

9. Although Defendant's representative was not present at the time, Magistrate Judge Mix told me, Mr. Phillips and Ms. Vickles that she would begin the settlement conference anyhow. She indicated that while her normal procedure was to speak to the Plaintiff first, she had decided to speak to the Defendant first, indicating it would be brief. She then escorted Mr. Phillips and me to a jury room, where we waited.

10. A short time later, Magistrate Judge Mix came back to the jury room to meet with us.

11. Magistrate Judge Mix sat at the table with her back to the windows, directly across from Mr. Phillips. I was seated to Mr. Phillips right.

12. Magistrate Judge Mix began the discussion by calmly advising Mr. Phillips of the purposes of the settlement conference. She noted, in particular, the benefits of settlement and the risks of litigation. She further advised Mr. Phillips that "now" was the time to resolve the case and the opportunity might not be there again.

13. Mr. Phillips indicated to Magistrate Judge Mix that he understood what she had communicated.

14. Magistrate Judge Mix then said the following to Mr. Phillips, "*The biggest problem with your case is that Judge Nottingham hates employment cases and there's nothing you can do about it, it's random. Now don't get me wrong, he's a fine judge, but he just hates employment cases. That's why he will try to find any way in the summary judgment briefs to say there's no material issues and grant summary judgment, and if he doesn't, he will make it tough at trial, and you won't win.*"

15. Magistrate Judge Mix told Mr. Phillips he should take what he could get; repeatedly saying that he should take the severance that Pepsi had offered.

16. When Mr. Phillips and I were unreceptive, Magistrate Judge Mix launched into a confrontive and demeaning harangue towards us.

17. Magistrate Judge Mix began by accusing me of exaggerating matters in the Plaintiff's September 14, 2007 Confidential Settlement Statement (statement).

18. Specifically, Magistrate Judge Mix admonished me over my characterization of Judge Nottingham's February 13 and February 27, 2007 Orders granting a continuance of summary judgment proceedings and allowing additional discovery into newly raised evidence.  
[Docket #48; Docket #50]

19. In my statement, I pointed out the May 10, 1999 late produced letter from Pepsi, showing that it made the decision to terminate Plaintiff much earlier than Pepsi had previously claimed.

20. In my statement I said Judge Nottingham acknowledged the significance of the May 10, 1999 letter, when he allowed the reopening of discovery and rebriefing of summary judgment.

21. Magistrate Judge Mix then confronted me with Judge Nottingham's February 27, 2007 Order, which she waived in front of me and Mr. Phillips, saying it showed, "*nothing of the kind*".

22. Magistrate Judge Mix told Mr. Phillips he was getting bad advice from his attorney.

23. Magistrate Judge Mix concluded by saying, "*Mr. Phillips, I'm going to look you right in the eye and tell you that you're gonna lose.*"

24. In May 2006, following discovery and summary judgment briefing, Pepsi produced, for the first time, certain documents from the files of Scott Beijer, Plaintiff's supervisor, at the beginning of Plaintiff's alleged declining performance.

25. In February 2007, Judge Nottingham had no choice but to allow Plaintiff to reopen discovery after the Court was advised that Pepsi had withheld critical termination documents, including a May 10, 1999 letter.

26. Disturbingly, despite the fact that neither Mr. Phillips nor I had done anything improper, Judge Nottingham's tone reflected his displeasure in having to find in Plaintiff's favor.

27. Judge Nottingham would act upon his displeasure by granting Plaintiff "*no relief*" relief.

28. Judge Nottingham restricted Plaintiff's discovery into the May 10, 1999 termination letter to a narrow re-deposing of Scott Beijer, who said, in his affidavit, he had "*no*

*recollection of the circumstances surrounding the ... termination letter dated May 10, 1999.*"

Therefore, when Judge Nottingham limited the discovery to Beijer's deposition he effectively denied the discovery he claimed to have allowed.

29. Judge Nottingham did not hesitate to demean Mr. Phillips or me in his February 27, 2007 Order. He stated, emphatically, that Plaintiff "*has no one to blame but himself*" for the narrow discovery ordered by the Court, concluding that "*Plaintiff is entitled to nothing more.*" Yet, he spared Defendant and its counsel all unkindness in the face of their clear violations.

30. Judge Nottingham made no attempt to hold Defendant or its counsel accountable for their acts, which caused an enormous rewrite of the summary judgment response and a trip to Salt Lake City, Utah to re-depose Beijer.

31. I believe that Magistrate Judge Mix's statements about Judge Nottingham's hostile attitudes towards Civil Rights Plaintiffs is a true and accurate statement and reflection. I believe that Judge Nottingham is intent on and intends to dismiss Mr. Phillips meritorious claims no matter what evidence Mr. Phillips presents.

